

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

In the Matter of )  
)  
Review of the Commission's )  
Broadcast and Cable )  
Equal Employment Opportunity )  
Rules and Policies )  
and )  
Termination of the )  
EEO Streamlining Proceeding )

MM Docket No. 98-204  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 96-16

To: The Commission

**JOINT COMMENTS OF 46 NAMED STATE BROADCASTERS ASSOCIATIONS**

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## SUMMARY

The 46 named state broadcasters associations joining in these comments (the "Associations"), representing the broadcasters associations in 46 states, the District of Columbia and Puerto Rico, fully share the Commission's goals of non-discrimination, workplace diversity and programming that serves the interests of all members of broadcasters' communities. Moreover, just as the Commission, the Associations believe that there should not be "sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male," and that any new EEO Regulations requiring stations to make outreach efforts be fully consistent with the Fifth Amendment of the United States Constitution. *NPRM* ¶ 1, *citing Lutheran Church- Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *reh. denied*, 154 F.3d 487 (D.C. Cir.), *reh. en banc denied* 154 F.3d 494 (D.C. Cir. 1998). The Associations submit that the FCC's objective here should be to help the broadcast industry find ways to facilitate successful job searches by both station employers and prospective employees, regardless of gender, race or ethnicity, and not to impose bureaucratic paper processes that only serve to take away from the key objective of finding real jobs for real people.

In their comments, the Associations outline the constitutional requirements that any new EEO Regulations must meet, and then make proposals for regulations that the Associations believe will be effective, will clearly meet constitutional requirements, and will not create expensive, time-consuming and unnecessary paperwork. The Associations believe that the series of affirmative action steps proposed by the Commission in the *NPRM* raise grave issues under the Fifth Amendment of the United States Constitution. The proposals that would, for example,

require stations to focus on minority and female specific referral sources, to analyze the "productivity" of sources in terms of their referrals of minorities and women, to compare their applicant or interview pools to some supposed labor force profile in order to ensure a "cross section of qualified applicants," and to file reports on the race and gender of their workforces, do not constitute narrowly tailored measures that further compelling governmental interests as required by the Constitution. The Associations believe that the series of steps proposed by the Commission would not withstand judicial review because they are based on constitutionally illegitimate stereotypes and pressure stations to make race-based employment and hiring decisions.

In order to avoid these constitutional problems, the Associations propose an outreach program based on use of state broadcasters associations' Broadcast Careers Web Pages. Those web pages on the Internet will have notices of job openings at stations throughout the country, making information on jobs conveniently available to men and women of all races and ethnicities. On the web pages, any person will also be able to post his or her resume, free of charge, so that stations throughout the United States will have a ready source of applicants of all races, ethnicities and genders. The Associations believe that in an environment where use of the Internet is growing rapidly, and more Americans are turning to Internet recruiting services as a source of career information, a program designed along these lines will be highly effective in serving the Commission's goal of broad outreach. Such a program is the just the kind of race-neutral outreach and non-discriminatory recruitment program that the courts have held does not implicate the guarantees of the Fifth Amendment. Neither race-conscious "self-assessment" steps nor the filing of annual employment reports (Form 395-B) will be necessary or appropriate,

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thereby avoiding both constitutional problems and eliminating expensive, time-consuming and unnecessary paperwork. By contrast, the Commission's proposal that stations be required to file annual reports raises grave issues under the Fifth Amendment because it is far too easy for either the Commission or a third-party filing a petition to deny to use these reports for the *improper* purpose of comparing the racial or ethnic composition of a particular station's workforce to the composition of some sort of hypothesized labor pool and then to use such comparisons to make claims about the supposed defects in its recruitment efforts toward minorities or its commitment to nondiscrimination.

The Associations agree with the conclusion in the *NPRM* that the Commission should prohibit its broadcast licensees from discriminating on the ground of race, color, national origin, religion or sex. But the Associations believe that the FCC should defer to the Equal Employment Opportunity Commission ("EEOC"), state EEO agencies and the courts for the resolution of cases relating to discrimination complaints, whether the complaints involve allegations of discrimination against an individual or charges of a "pattern and practice" of discrimination. If the EEOC or the courts finally determine that a broadcaster has in fact discriminated, the Commission can then determine the appropriate sanction to impose on the broadcaster in the circumstances. A coordinated arrangement between the FCC and the EEOC will permit adjudicators with real expertise to determine whether allegations are valid and will allow for fairness to all involved.

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**JOINT COMMENTS OF 46 NAMED STATE BROADCASTERS ASSOCIATIONS**

The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New

York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively the "Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submit their joint comments in response to the above-captioned *Notice of Proposed Rule Making* (the "NPRM"), 63 Fed. Reg. 66104 (1998).<sup>1</sup>

## **I. INTRODUCTION AND SUMMARY**

1. The Associations are pleased to continue the participation of state broadcasters associations in the Commission's efforts to formulate a new equal employment opportunity ("EEO") rule and related policies (collectively, "EEO Regulations"). Previously, some twenty-three state broadcasters associations filed Joint Comments in the FCC's EEO proceeding in MM Docket No. 94-34. In their Joint Comments filed on June 14, 1994, those Associations stressed their full support of the FCC's goals of promoting programming that reflects the interests of all

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<sup>1</sup>In addition to the 46 Associations filing these comments, representing the broadcasters associations in 46 states, the District of Columbia and Puerto Rico, three additional state associations are filing separately in support of the proposals made herein, namely the New Jersey Broadcasters Association, North Carolina Association of Broadcasters and Virginia Association of Broadcasters.

members of local communities, including minorities and women, and of deterring discriminatory employment practices. The Associations submitted, however, that the FCC's then-EEO Regulations created unnecessary administrative and paperwork burdens and were in need of substantial repair. Thereafter, on July 11, 1996, some twenty-six state broadcasters associations filed Joint Comments in the FCC's EEO "Streamlining" proceeding in MM Docket No. 96-16, reaffirming these positions.

2. The Associations affirm once again that they share the Commission's goals of non-discrimination, workplace diversity and programming that serves the interests of all members of broadcasters' communities. Moreover, just as the Commission, the Associations believe that there should not be "sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male" (*NPRM* ¶ 62), and that any new EEO Regulations requiring stations to make outreach efforts be fully consistent with the Fifth Amendment of the United States Constitution. *NPRM* ¶ 1, citing *Lutheran Church- Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *reh. denied*, 154 F.3d 487 (D.C. Cir.), *reh. en banc denied* 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"). The Associations submit that the FCC's objective here should be to help the broadcast industry find ways to facilitate successful job searches by both station employers and prospective employees, regardless of gender, race or ethnicity, and not to impose bureaucratic paper processes that only serve to take away from the key objective of finding real jobs for real people. The Associations remain concerned, as they stated in their earlier comments, that unnecessary administrative and paperwork burdens not be imposed on broadcasters. In Comments to be filed in this proceeding, the National Association of Broadcasters ("NAB") expresses the same concerns and offers constructive alternative proposals



for insuring compliance with any new EEO outreach Regulations. The Associations fully support those proposals.

3. In these comments, the Associations outline the constitutional requirements that any new EEO Regulations must meet, and then make proposals for regulations that the Associations believe will be effective, will clearly meet constitutional requirements, and will not create expensive, time-consuming and unnecessary paperwork. The Associations believe that the series of affirmative action steps proposed by the Commission in the *NPRM* raise grave issues under the Fifth Amendment of the United States Constitution. The proposals that would, for example, require stations to focus on minority and female specific referral sources, to analyze the "productivity" of sources in terms of their referrals of minorities and women, to compare their applicant or interview pools to some supposed labor force profile in order to ensure a "cross section of qualified applicants," and to file reports on the race and gender of their workforces, do not constitute narrowly tailored measures that further compelling governmental interests as required by the Constitution. The Associations believe that the series of steps proposed by the Commission would not withstand judicial review because they are based on constitutionally illegitimate stereotypes and pressure stations to make race-based employment and hiring decisions.

4. In order to avoid these constitutional problems, the Associations propose an outreach program based on use of state broadcasters associations' Broadcast Careers Web Pages. Those web pages on the Internet will have notices of job openings at stations throughout the country, making information on jobs conveniently available to men and women of all races and ethnicities. On the web pages, any person will also be able to post his or her resume, free of

charge, so that stations throughout the United States will have a ready source of applicants of all races, ethnicities and genders. The Associations believe that in an environment where use of the Internet is growing rapidly, and more Americans are turning to Internet recruiting services as a source of career information, a program designed along these lines will be highly effective in serving the Commission's goal of broad outreach. Such a program is the just the kind of race-neutral outreach and non-discriminatory recruitment program that the courts have held does not implicate the guarantees of the Fifth Amendment. Neither race-conscious "self-assessment" steps nor the filing of annual employment reports (Form 395-B) will be necessary or appropriate, thereby avoiding both constitutional problems and eliminating expensive, time-consuming and unnecessary paperwork. By contrast, the Commission's proposal that stations be required to file annual reports raises grave issues under the Fifth Amendment because it is far too easy for either the Commission or a third-party filing a petition to deny to use these reports for the *improper* purpose of comparing the racial or ethnic composition of a particular station's workforce to the composition of some sort of hypothesized labor pool and then to use such comparisons to make claims about the supposed defects in its recruitment efforts toward minorities or its commitment to nondiscrimination. Such allegations indisputably pressure stations to make race-based hiring decisions; and the requirement that makes them likely would therefore be subjected to strict scrutiny.

5. The Associations agree with the conclusion in the *NPRM* that the Commission should prohibit its broadcast licensees from discriminating on the ground of race, color, national

origin, religion or sex.<sup>2</sup> But the Associations believe that the FCC should defer to the Equal Employment Opportunity Commission ("EEOC"), state EEO agencies and the courts for the resolution of cases relating to discrimination complaints, whether the complaints involve allegations of discrimination against an individual or charges of a "pattern and practice" of discrimination. If the EEOC or the courts finally determine that a broadcaster has in fact discriminated, the Commission can then determine the appropriate sanction to impose on the broadcaster in the circumstances. A coordinated arrangement between the FCC and the EEOC will permit adjudicators with real expertise to determine whether allegations are valid and will allow for fairness to all involved.

## **II. DISCUSSION**

### **A. THE UNITED STATES CONSTITUTION CIRCUMSCRIBES ANY NEW FCC AFFIRMATIVE ACTION REQUIREMENTS**

6. As the Commission acknowledges in the *NPRM* (at ¶ 1), it is critical that any new EEO Regulations be consistent with the requirements of the Equal Protection Clause of the Fifth Amendment of the United States Constitution. The Supreme Court has held that under the Fifth Amendment, "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand v. Peña*, 515 U.S. 200, 227 (1995) ("*Adarand*"). The Court has stated that the "central mandate" of the Fifth Amendment's Equal Protection Clause is "racial neutrality in governmental decision making." *Miller v. Johnson*, 515 U.S. 900,

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<sup>2</sup>The Associations fully support the "religious exemption" proposed by the Commission for religious broadcasters.

904 (1995). "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Id.*

7. In *Lutheran Church*, the United States Court of Appeals for the District of Columbia Circuit ruled that the Commission's affirmative action regulations for broadcasters were unconstitutional under the Equal Protection Clause of the Fifth Amendment. *Lutheran Church*, 141 F.3d 344. The Court held that the regulations influenced ultimate hiring decisions by broadcast licensees and provided a strong incentive for broadcasters to meet numerical goals for hiring minorities and women. *Id.* at 351, 352. And because the regulations were neither justified by a compelling governmental interest, nor narrowly tailored to achieve any such interest, they could not survive constitutional scrutiny. *Id.* at 356. In denying rehearing, the Court of Appeals made clear that "the degree to which the regulations pressure, induce, or even encourage the hiring of particular races is not the logical determinant of whether the regulation calls for a racial classification.... Because the FCC's regulations ... indisputably pressure -- even if they do not explicitly direct or require -- stations to make race-based hiring decisions, under the logic of *Adarand*, they too must be subjected to strict scrutiny." *Lutheran Church*, 154 F.3d at 491 (citation omitted).

8. In its initial ruling in *Lutheran Church*, the Court of Appeals stated that it "rather doubt[ed]" whether any rule that affected employment decisions by, for example, requiring stations to choose minority-specific referral sources and conducting formal analyses of their success in recruiting minorities and women, would be exempt from strict scrutiny under the Fifth Amendment. *Lutheran Church*, 141 F.3d at 351. The Court of Appeals noted that while it might be claimed that such requirements have no "immediate" effects on who was employed, it is

doubtful that the Equal Protection Clause had any exception for employment decisions that might be considered "insignificant" or "*de minimis*" by some. *Id.* In denying rehearing, the Court of Appeals stated that it did not need to decide the question as to whether the Government can require or encourage any outreach program "specifically targeted on minorities." *Lutheran Church*, 154 F.3d at 492. In connection with this issue, the Court of Appeal's only ruling in the *Lutheran Church* case was: "If the regulations merely required stations to implement racially neutral recruitment and hiring programs, the equal protection guarantee would not be implicated." *Lutheran Church*, 141 F.3d at 351.

9. The Court of Appeals also held in the *Lutheran Church* case that "diversity" can never be a compelling governmental interest under the Fifth Amendment. *Lutheran Church*, 141 F.3d at 354; *see Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) (describing *Lutheran Church* as ruling out diversity as a compelling governmental interest in the employment context). In this regard, the Court of Appeals found instructive the dissent by Justice O'Connor (the author of *Adarand*) in *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 602-631 (1990) ("*Metro Broadcasting*"). Justice O'Connor found the argument that diversity in ownership is necessary to achieve diversity in programming on broadcast stations to be open to grave suspicion because it assumes that people's "race or ethnicity determines how they think or act," and thus rests on illegitimate stereotypes. *Id.* at 602; *see also id.* at 615, 618, 626. Moreover, Justice O'Connor found that the interest in broadcast diversity is "too amorphous, too insubstantial," *id.* at 612, to rule out the possibility of racial preferences or prejudices. She noted that the FCC might under cover of this alleged interest, identify a "black" or "Asian" or "Arab" viewpoint, and then require stations to take steps that the Government deems likely to result in the presentation of the favored

view. *Id.* at 615. Recognizing a generalized interest in diversity would allow what Justice O'Connor found would be great and indiscriminate use of racial classifications not just for particular purposes and a limited time, but for all purposes and for all time. *Id.* at 614. Because it is impossible to define a particular racial viewpoint, or to assess how diverse one viewpoint is from another, "[m]embers of any racial or ethnic group, whether now preferred under the FCC's policy or not, may find themselves politically out of fashion and subject to disadvantageous but 'benign' discrimination." *Id.* at 615.

10. In *Lutheran Church*, the Court of Appeals also ruled that the FCC's EEO regulation covering low-level as well as high-level employees could not survive intermediate scrutiny under the Fifth Amendment. *Lutheran Church*, 141 F.3d at 356. Under intermediate scrutiny, a program is lawful under the Fifth Amendment only if it serves important governmental objectives and is substantially related to the achievement of those objectives. *See Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992) (holding that FCC's sex-based preference could not survive intermediate scrutiny and was therefore unconstitutional because the Commission introduced no evidence supporting a link between female ownership and diversity of programming). The Court of Appeals noted in *Lutheran Church* that the Commission had not "introduce[d] a single piece of evidence ... linking low-level employees to programming content," and that the Commission's policies concerning the scope of the job positions covered by its affirmative action rules were self-contradictory. *Lutheran Church*, 141 F.3d at 356.

**B. THE COMMISSION'S PROPOSED AFFIRMATIVE ACTION REQUIREMENTS ARE GRAVELY SUSPECT UNDER THE FIFTH AMENDMENT**

**1. FCC Proposals For Recruitment**

11. With all due respect to the Commission's goals, which the Associations share, the Associations believe that the series of affirmative action requirements for recruitment proposed in the *NPRM* would create a program that would raise grave concerns under the Fifth Amendment of the United States Constitution. The proposed requirement that stations use a specific number of recruitment sources, including "minority and female specific sources," and then conduct formal analyses of the sources' "productivity" in referring minorities and women (*see NPRM* ¶ 65), is just the sort of program that the United States Court of Appeals for the District of Columbia Circuit stated it "rather doubt[ed]" would be exempt from strict scrutiny under the Fifth Amendment. *Lutheran Church*, 141 F.3d at 351. The alternative suggestion in ¶ 64 of the *NPRM* that broadcasters be required to "demonstrate that their efforts attract a broad cross section of qualified applicants" would require stations not only to keep records of the race and gender of each applicant for each job, but also to compare the racial compositions of their applicant pools to some labor force profile in order to determine whether they had attracted what could be deemed to be a "cross section of qualified applicants." But once such comparisons to the labor force are used, whether by a station or by some third party contesting the efforts of the broadcaster, the FCC's new regulations require "race-based decisionmaking" and will "indisputably pressure...stations to make race-based hiring decisions...." Thus, these requirements would not only create burdensome paperwork, they would also subject the Commission's rule to strict scrutiny. *Lutheran Church*, 154 F.3d at 491; *see also NPRM* ¶ 52,

stating that the Commission should avoid requiring licensees to compare their employment profile with their local labor forces. To see that this is so, one need only consider a proposal that stations be required to use "majority and male specific recruitment sources," conduct formal analyses of whether those sources had been "productive" in referring white males, and then keep records to demonstrate that their applicant pools contained enough white males to represent some sort of "cross section of qualified applicants." There can be no doubt that the Commission would -- and should -- reject such a proposal as violating the Fifth Amendment. And under the Court's ruling in *Adarand*, the Commission's proposals must be subjected to the same level of scrutiny.

**2. FCC Proposal for Filing Annual Workforce Data**

12. The proposed requirement in the *NPRM* that stations be required to file with the Commission (and place in their public inspection files) annual workforce data showing the race and gender of their workforces would serve to augment the pressure on stations to make race-based employment decisions. Based on these annual reports, the Commission -- and especially those who file petitions to deny -- could use comparisons of the racial composition of a station's workforce and the racial composition of a hypothesized labor market to make allegations about supposed problems with a station's recruitment efforts toward minorities or commitment to nondiscrimination.<sup>3</sup> And any rule that leads to such comparisons and allegations would

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<sup>3</sup>There are many cases where petitioners to deny have used such comparisons to make allegations that broadcast stations have not complied with the Commission's EEO requirements. See, e.g., *Lanser Broadcasting Corporation* (WWJQ(AM)/WJQK (FM)), 7 FCC Rcd at 4255 ¶ 12 (1992) (petitioners complained that stations had an "unproductive" EEO program that resulted in no minority hires); *Renewal of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia* (WBHP(AM)), 6 FCC Rcd at 5971 ¶ 27 (petitioners complained that

(continued...)



"indisputably pressure ... stations to make race-based hiring decisions, ... [and would therefore be] subjected to strict scrutiny." *Lutheran Church*, 154 F.3d at 491 (citation omitted); see *Wessmann v. Gittens*, 160 F.3d at 799 ("[u]nderrepresentation is merely racial balancing in disguise -- another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.")

### **3. FCC Proposals for Further Affirmative Action Efforts**

13. The paperwork burdens and pressure to be race conscious will also be further increased by the "general EEO policy/program requirements" suggested in ¶¶ 54-55 of the *NPRM*. For example, the requirement that stations "avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women" would in effect place a station at risk of having its license applications denied if it used any employment test or criterion, even if job related, that might put minorities and women at a disproportional advantage. While no one should countenance any form of unlawful discrimination, this proposed requirement is much more stringent than that set forth by Section 105 of Title VII, 42 U.S.C. §2000e-2(k)(1)(A). Title VII states that an unlawful employment practice based on disparate impact is established only if a complaining party demonstrates that the employer uses a particular employment practice that causes a disparate impact and the employer fails to demonstrate that the practice is job related for the position in question and is consistent with business necessity. Unlike Title VII, the requirement proposed by the FCC would put the burden of proof on the

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<sup>3</sup>(...continued)

station did not hire any minorities during the reporting year and had provided "no explanation in its renewal application 'for the near absence of minorities in meaningful positions throughout the license term'"; *id.* (WQPW (FM)), 6 FCC Rcd at 5972 ¶ 32 (1991) (petitioners complained that no minorities were listed as part of station's staff on FCC Annual Employment Reports).

station rather than on the employee, and also would not permit the station to defend itself with a showing that the selection techniques and tests were job related and necessary. The FCC has not justified singling out the broadcast industry for this disparate treatment. The Associations submit that this requirement, as well as many of the other "general EEO policy/program requirements" suggested in ¶¶ 54-55 of the *NPRM*, are not only unfair relative to Title VII, but would increase stations' race consciousness in employment decisions and would collectively add to the pressure on stations to take race-based employment actions, thereby subjecting the Commission's rule to strict scrutiny. *Lutheran Church*, 154 F.3d at 491.

#### **4. The FCC's Program Diversity Rationale**

14. In seeking to justify many of its proposals, the Commission seeks comment on whether there is a nexus between minority and female employment and diverse programming, and further seeks empirical evidence to support commentators' assertions that such a link exists. (*NPRM* ¶ 45). But even if there were such a link -- a proposition about which the Associations are doubtful -- any attempt by the Commission to justify new affirmative action rules on the basis of their alleged link to "diverse programming" (*NPRM* ¶¶ 39-45) would be gravely problematic under the Fifth Amendment. *Lutheran Church*, 141 F.3d at 354; see *Metro Broadcasting*, 497 U.S. at 602-631 (O'Connor, J., dissenting).

15. To begin with, the Associations are at a loss to understand what the Commission means by "diverse programming." Is it the programming available through competing distribution technologies such as broadcast, cable, DBS, DARS and the Internet? Is the term intended to mean programming originated by a multiplicity of program creators, regardless of their common ownership or affiliation? Or is the Commission only interested in having an

adequate mix of programs produced by *unaffiliated* producers? Is the Commission's real focus on multiplicity of *distributors* of programming to various electronic media rather than on the producers of programming? In any case, whether the Commission's focus is on the race and gender of the persons creating the programming in the first instance or the persons selecting the programming for mass media distribution, the Associations have no experience to demonstrate that there is a minority point of view or a female point of view on all subjects, topics or issues. The Associations do not believe there is a substantial nexus between minority and female employment and "diverse programming."

16. But even assuming solely for the sake of argument that such a link could somehow be found, the Associations believe that any policy based on the supposed link would necessarily rest on the claim that people's "race or ethnicity determines how they think or act," and would thus rest on the constitutionally illegitimate and dangerous stereotypes condemned by the Court of Appeals in *Lutheran Church* and by Justice O'Connor in her dissent in *Metro Broadcasting*, 497 U.S. 547 at 602, 615, 618, and 626. With all due respect, the Associations submit that the Commission must avoid any action that rests on such stereotypes or on an interest in "diversity" that, as Justice O'Connor found is simply "too amorphous, too insubstantial" to rule out the possibility of racial preferences or prejudices. *Id.* at 612.

**C. STATION PARTICIPATION IN A STATE BROADCASTERS  
ASSOCIATION'S INTERNET BROADCAST CAREERS  
PROGRAM SHOULD CONSTITUTE COMPLIANCE WITH  
ANY NEW EEO REQUIREMENTS**

17. Even before the Court of Appeals decision in *Lutheran Church*, the umbrella organization of the state broadcasters associations, the Broadcast Executive Director's Association ("BEDA"), was at work developing the "Model Broadcast Careers Road Map,"

("Model Program ") which is attached to these Comments as Exhibit 1. The Model Program was informally presented to the Commission. The Chairman's Office made a number of constructive comments which were incorporated into the program.

18. The Model Program is actually an outgrowth of a series of meetings between broadcast industry representatives and representatives of various public interest, minority and female organizations. Those meetings were held between March and the summer of 1997 at the urging of Mass Media Bureau Chief Roy Stewart and then Deputy Chief Renee Licht. While those meetings did reflect a common commitment to the goals of nondiscrimination and workplace diversity, they did not result in any consensus on how best, on a regulatory level, to achieve those goals. However, the state associations found the meetings important and helpful in emphasizing the need to find new ways to pursue these goals. Thus was born the Model Program with the help of a taskforce of state association executive directors and the NAB.

19. The Model Program represents the continuation of the proactive efforts by the state associations in assisting their members to enhance access by minorities and women to increased employment opportunities at broadcast stations nationwide. Many state associations, in cooperation with the NAB and others, have for many years regularly conducted continuing education programs on the topic of EEO at annual conventions and special seminars. The FCC has supported these efforts by sending its own staff to participate on panels. The subject of EEO is also addressed in regular and special newsletters of the various associations. The associations urge their members to seek counsel in this important area from the NAB, the FCC or from attorneys in private practice. Some of the state associations have set up legal hot lines to help

their members on this subject and others. Most have job banks and an increasing number have placed their job banks on the Internet.

20. As mentioned, the Model Program reflects the efforts of the state broadcasters associations to explore new, nontraditional ways to encourage men and women of all races and ethnicity to consider careers in broadcasting. The initiative reflects these facts: 1) the broadcast industry competes with many other industries for both entry level and upper level employees; 2) to compete effectively, the broadcast industry must promote, on an ongoing basis beginning in high schools, a strong interest in a career in broadcasting, as well as provide educational and experience opportunities for a career in broadcasting; 3) the industry must make it as convenient as possible for any person to learn about a job opening and to send his or her resume to the station for consideration; 4) the industry must promote training and upward mobility for all workers, including minorities and women; and 5) the industry must work with educational institutions and general and targeted organizations to accomplish these goals.

21. The Associations are gratified that the Commission has stated in the *NPRM* that the BEDA program offers sound guidance for the type of outreach program that broadcasters should design. *NPRM* at ¶ 91. The Associations believe that the BEDA's Model Program, and in particular its broad, race-neutral outreach to persons who might not learn of job positions at broadcast stations through word-of-mouth, represents the sort of nondiscriminatory recruitment programs that the Court of Appeals held would not implicate the guarantee of the Equal Protection Clause of the Fifth Amendment. *Lutheran Church*, 141 F.3d at 351. The Associations therefore submit that the Commission should rely on use of the Model Program rather than on the constitutionally problematic affirmative action requirements proposed in the *NPRM* and

discussed above. It is crucial to note that the Supreme Court has stressed the importance of examining whether the government has looked first at race-neutral measures such as the Model Program in judging whether the government can establish that racial classifications are actually narrowly tailored to advancing an identified compelling interest and therefore valid. *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989).

22. The Model Program reaffirms the FCC's goals of non-discrimination in all employment actions as well as diversity in the workplace. The Model Program acknowledges and responds to the need to interest more people of all races and ethnicities in careers in the broadcast industry -- including minorities and women -- in order to ensure broadcasting's continued vitality and success. To this end, the Model Program focuses on a variety of steps that will enhance the attractiveness and availability of broadcast employment including:

(a) educating people, particularly young people, about the rewards of a broadcasting career; (b) expanding educational courses and experience opportunities, including scholarships and paid internships, to learn about the industry; (c) maximizing the pools of qualified applicants, including those from culturally and racially diverse backgrounds, for all job openings at participating stations by promoting awareness of a wide variety of programs such as web sites, job fairs and others; (d) training employees for increased responsibilities in the broadcast industry; and (e) educating the broadcast industry about their responsibilities in this area. The Model Program provides each state association with a framework for analyzing its efforts to help member stations recruit prospective employees, including minorities and women. The program also suggests numerous proactive ways an association can increase its effectiveness, subject to the evolving needs and resources of the association.

23. The key element in the Model Program, for the Commission's purposes in designing a nondiscriminatory outreach rule that clearly complies with the Fifth Amendment, is the state associations' sponsorship of their own Broadcast Careers Web Pages, as well as BEDA's Broadcast Careers Web Site, which is expected to be operation in March 1999. Using these Internet pages and site, which will be available 24 hours per day, 365 days per year, broadcasters will encourage potential applicants of all races and genders for jobs in the broadcast industry to post their resumes, *free of charge*, so that member stations will have a ready source of job applicants of all races and genders. The state associations' Broadcast Careers Web Pages will contain not only resumes of potential applicants, but also notices of *job openings* at stations that will list full-time and part-time job openings, categorized by radio and television, in the following ways: (1) by type of position - management, on-air/writer/producer, sales/marketing, engineering/technical and clerical/administrative; and (2) by city and station. BEDA's national Broadcast Careers Web Site will also allow for postings of both resumes and notices of job openings, and will be available for job postings especially by stations whose state associations may not yet have a web site. The BEDA Broadcast Careers Web Site will also publicize each state association's web page to ensure that applicants willing to re-locate to a different area have access to job postings throughout the country. The state associations' Broadcast Careers Web Pages and BEDA's Broadcast Careers Web Site will also be linked to the NAB's Careers Center Web Page, which the Associations will also promote. Under the BEDA Model Program, every member station is encouraged to post both their full-time and part-time job vacancies on the site, an announcement of which then becomes available to the general public, in effect creating a vast national "job bank."

24. There are 50 state broadcasters associations which include all of the states, the District of Columbia and Puerto Rico. 66% of the state associations have formally adopted a Broadcast Careers Program. See, for example, the Broadcast Careers Program of the Massachusetts Broadcasters Association, attached hereto as Exhibit 2. The rest are considering doing so. 86% of the state associations already have web sites. Of that number, 70% have web pages devoted to job vacancy listings and 43% already have sites that accept resumes of persons interested in positions. Many more associations expect to have web sites and Broadcast Careers Web Pages up and running by the end of 1999. Those state associations that cannot afford to install and maintain their own web sites are expected to promote the use of the BEDA Broadcast Careers Web Site by their member stations and by the general public in their states.

25. As a non-exclusive recruitment outreach technique, participating stations will be encouraged to commit and timely post each of their full-time and part-time job openings on the state associations' Broadcast Careers Web Pages and/or the BEDA Broadcast Careers Web Site unless a particular opening is sensitive and not publicized at the station. By using a proprietary code, stations themselves will be able to e-mail their job openings directly to the appropriate Broadcast Careers Web Page for posting. Stations will be responsible for the currency and accuracy of their job opening information. Participating stations will be encouraged to commit to being Equal Opportunity Employers and using the "EOE" designation on all postings on the Broadcast Careers Web Pages as well as in all advertisements for their full-time and part-time job openings. Participating stations will be encouraged to commit to timely advising their current full-time and part-time employees of all Broadcast Careers Web Page postings by the station. Participating stations will be encouraged to use a common information form for posting their job



openings on a state association's Broadcast Careers Web Page or on the BEDA Broadcast Careers Web Site. Participating stations will be encouraged to commit, taking into account the exigencies of a particular situation, to keeping each job position posted on the Internet pages and site and open for at least a reasonable number of days to afford interested persons an opportunity to learn about the opening and to apply for the job. The stations will also be responsible for promptly removing the job postings that they have filled. If a posting has not been "re-posted" by the station within 30 days of the original posting, it will be automatically purged from the Internet job bank. Participating stations will be encouraged to commit to providing the station's current telephone number, e-mail address and fax number in all postings to enable any person wishing to respond to a job opening to do so quickly, by e-mailing or faxing a completed "common" job resume form to the station.

26. Members of the public will be able to browse through the state associations' Broadcast Careers Web Pages and BEDA's Broadcast Careers Web Site at no charge. Participating stations will be encouraged to commit to considering the resumes received in response to a job posting and, as time constraints and resources permit, to interviewing a number of qualified candidates, including culturally and racially diverse applicants. Participating stations will be encouraged to promptly inform unsuccessful candidates of the station's hiring decisions (by indicating on the Internet job bank that this position has been filled) and, subject to the permission of the candidate, to circulate the resumes of these candidates to the state associations to be made available to other stations for their consideration unless the resume is already posted on the Internet. Any member of the public will be able to post on the state associations' Broadcast Careers Web Pages and/or on BEDA's Broadcast Careers Web Site, free of charge, his

or her resume, preferably using the “common” job resume form, so that stations can quickly become aware of and contact persons who have the qualifications that they need for particular positions. The state associations expect to promote the availability of their Broadcast Careers Web Pages and the BEDA Broadcast Careers Web Site, over the air, in print media, at job fairs, through minority and female targeted organizations, and in other ways.

27. The potential impact of this service in eliminating word-of-mouth recruitment as the sole or even primary means of finding qualified applicants is enormous. The Commission is well aware that use of the Internet is spreading rapidly in the United States, and the World Wide Web is fast becoming the primary medium Americans use for research and information gathering. According to an October, 1997 survey, one in five households then used the World Wide Web in their homes, and almost as many also had access to the Web at their school or place of employment. *The Wirthlin Report Online: Who's Online? A Profile of U.S. Internet Users*, 1998.<sup>4</sup> The number of individuals who use the Internet has been growing and continues to grow at a rate of 67,000 per day, and the Web's demographics are flattening to resemble those of the population at large as an increasing number of minorities use the Internet. According to a study by the Harris Survey Unit of Baruch College, men and women use the Internet almost equally, and the racial composition of U.S. Web users is “statistically indistinguishable from Census data for the general population.” David Birdsell, *The Public Perspective*, April/May 1998. Even for those Americans who do not have residential Internet access, the number of schools and libraries offering free access continues to increase. According to a recent survey, 83.6% of public libraries in the U.S. are connected to the Internet, and 73.3% of public libraries offer public

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<sup>4</sup>A copy of this Report is available online at [ww.decima.com/publicns/report/wr9803.htm](http://ww.decima.com/publicns/report/wr9803.htm).

access to the Internet. *See* 1998 National Survey of Public Libraries Outlet Internet Connectivity, American Library Association, Office for Information Technology Policy. That study notes that because the public Internet access rate is about equal in poverty and non-poverty areas, public libraries are helping to bridge the gap between those who have Internet access in the home and those who do not. *Id.* It should be noted that Internet access at public libraries, and the resulting availability of the Internet to all demographic groups, will increase because of new initiatives. For example, the Gates Learning Foundation has established a goal of connecting all public libraries to the Internet by 2003, supported by the donations of billions of dollars by Bill and Melinda Gates. "Gates's Library Gifts Arrive (Windows Firmly Attached)," *New York Times*, February 21, 1999 at A1. Thus far that foundation has donated money for the wiring of public libraries to the Internet and the purchase of public access computers in Alabama, Louisiana, and Mississippi, with Arkansas, Kentucky, West Virginia and New Mexico scheduled to receive funds next. *Id.*

28. Congress took a proactive role in assuring that all students will have access to the Internet by providing for universal service support mechanisms for schools and classrooms as a part of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 110 (1996), and gave the Commission a primary role in implementing that universal service initiative.<sup>5</sup> The Commission has itself recognized the value of the Internet in bringing information to the public in other contexts, and has established a Web site that allows members of the public to read FCC

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<sup>5</sup>Congress directed the Commission to "establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries." 47 U.S.C. §254(h)(2)(A) (1998).

documents online (see “FCC Information is Available Online,” *Public Notice*, April 6, 1995), listen to FCC meetings in real time (see “New FCC Site for Audio Broadcast over the Internet Established,” *Public Notice*, December 13, 1996), and file comments electronically (*In the Matter of Electronic Filing of Documents in Rulemaking Proceedings*, GN Docket No. 97-113, *Report and Order*, 13 FCC Rcd. 11322 (1998) (“*Electronic Filing Proceeding*”). In the *Electronic Filing Proceeding*, the Commission expressed its belief that electronic filing would encourage “greater and more diverse public input.” *Id.* at § 4. The Commission also noted that “[e]very commenting party supported the concept of filing,” and noted that the National Association for the Deaf observed that “the deaf and hard of hearing community relies on the Internet as an important form of communication.” *Id.*

29. In parallel with the growth of the Internet, more Americans are turning to Internet recruiting services as a source of career information. According to an American Management Association report, 70 percent of companies in the U.S. were actively using the Internet to advertise jobs and recruit employees in 1998, a large jump from the 51 percent in the previous year. According to one study, more than half of the general public planned to use the Internet to look for a job at some point in the future.<sup>6</sup> In addition to the posting of job openings on individual company web pages, a substantial industry has sprung up in recent years to provide job information. Forrester Research has estimated that spending on online recruitment will grow from \$105 million in 1998 to \$1.7 billion by 2003. Among the dozens of online job search sites are Monster.com ([www.monster.com](http://www.monster.com)), which recently had a highly-praised and prominent advertisement on the Super Bowl. Monster.com boasts of more than 170,000 online job postings

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<sup>6</sup>Study conducted by J. Walter Thompson’s Specialized Communications Group, 1998.

and more than a million online resumes. The Commission has joined the many businesses, organizations, and government entities that distribute information concerning job openings via the Internet, and now publicizes FCC job vacancies on its Employment Opportunities Web page. (See [www.fcc.gov/jobs](http://www.fcc.gov/jobs).) An increasing number of states are also creating their own career Web pages on the Internet, allowing employers to post job vacancies online and job seekers to post their resumes (*see, e.g.*, Maryland CareerNet, [www.careernet.state.md.us](http://www.careernet.state.md.us); Missouri Works! Web site, [www.works.state.mo.us/mw2.htm](http://www.works.state.mo.us/mw2.htm); Ohio Job Net Online, [www.state.oh.us/obes/job\\_net.htm](http://www.state.oh.us/obes/job_net.htm); Arkansas's "whatajob.com"). Many states now offer Internet access to job seekers, who can walk into state employment agency offices to use computers to search for job openings online. For example, the Wyoming Department of Employment offers Internet access for job seekers in twenty cities across the state. *See* Wyoming Department of Employment Web page, [wyjobs.state.wy.us/kiosk.htm](http://wyjobs.state.wy.us/kiosk.htm). And the State of Idaho offers Internet access to job seekers through 418 computer stations located in the 24 Idaho Job Service offices across the State. "Idaho Job Service Offices Transformed Into High-Technology Career Centers," *Idaho Business Review*, August 31, 1998, at 5A.

30. Based on these developments, it is clear that through use of the Broadcast Careers Web Pages and BEDA Broadcast Careers Web Site, a substantial and increasing part of the population of all races and genders will have virtually immediate access to information about job openings in broadcasting throughout the nation in the medium to which Americans are increasingly turning to find jobs. Both BEDA and the state associations intend to take steps to ensure that the broadcast job bank on the Internet, and the information and services it provides, becomes well known to potential job applicants of all races and genders throughout the nation.

BEDA and the state associations are, for example, committed to developing radio and television spots that will be distributed statewide and nationally which will inform the public of the state associations' Broadcast Carriers Web Pages and the BEDA Broadcast Careers Web Site. It is contemplated that these Internet locations will be hyperlinked to the web sites of other organizations like the FCC, NAB, BEA, RAB, AWRT, the NAACP, NOW, the Rainbow-Push Coalition and the Urban League, as well as the state and local chapters of these organizations, as well as to a number of Web sites have been created specifically to assist minority job seekers, such as Diversity Careers, [www.diversitycareers.com](http://www.diversitycareers.com), and the National Urban League Career Mosaic Career Center, [www.careermosaic.com](http://www.careermosaic.com). The Associations are also committed to placing advertisements in newspapers of general circulation in their states. Copies of advertisements that have already been placed by the New Hampshire Association of Broadcasters and Massachusetts Broadcasters Association in newspapers are attached hereto as Exhibit 3. A representative advertisement states:

**WANTED**

Applicants for Broadcast Industry Opportunities - All Positions. The Members of the Massachusetts Broadcasters Association (MBA) are committed to the FCC's goals of non-discrimination and affirmative action. Post resumes on the MBA web page at [www.massbroadcasters.org](http://www.massbroadcasters.org). Or mail resumes to : Massachusetts Broadcasters Association, Attn: Job Bank c/o Bedford Granite Group, 10 Chestnut Drive, Bedford, NH 03110. Also available at [www.massbroadcasters.org](http://www.massbroadcasters.org), a listing of open positions in Massachusetts broadcasting. The members of the MBA are equal opportunity employers. PLEASE SPECIFY THE POSITION(S) YOU WISH TO BE CONSIDERED FOR.

The Associations will also promote the web pages at job fairs and conferences that the Associations, the NAB, BEA, AWRT and others conduct as part of their efforts to attract qualified applicants of all races and genders to the broadcast industry so as to enhance the

industry's future. The Commission's goal to eliminate "sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male" (NPRM ¶ 62), will therefore be fulfilled through this dramatic new undertaking by broadcasters to make nondiscriminatory outreach efforts to the potential workforce.

31. The Associations submit that if the FCC, under new EEO regulations, requires that stations with five (5) or more full-time employees carry out an outreach program designed to provide information to all qualified applicants regarding job vacancies at the stations, it should *deem a station to be in compliance with that requirement if the station posts at least 67% of its job openings on the state broadcasters association's Broadcast Careers Web Page and/or the BEDA Broadcast Careers Web Site and reviews the applicable resumes on the Internet page or site and any resumes received by the station in response to the Internet posting before filling any job opening.*<sup>7</sup> In order to be in compliance, a station would be required to provide the FCC with the licensee's certification that the station has a publicly available e-mail address, has posted at least 67% of its total full time and part-time job vacancies on the state association's Broadcast Careers Web Page and/or BEDA's Broadcast Careers Web Site, and has reviewed pertinent resumes posted on the applicable Internet location and any responsive applications e-mailed or otherwise sent to the station before filling each posted job opening. These certifications should be required every two years on the anniversary dates of station renewals. No other reporting

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<sup>7</sup>To avail themselves of this compliance option, stations should be required to post a substantial majority, *i.e.*, 67% of its full-time and part-time job positions on the web site, but should have the discretion to elect not to post a particular job opening if there are good reasons not to do so. For example, a station may want to maintain confidentiality, and therefore not post a job opening, when it seeks to replace an incumbent on-air personality who is not performing at the desired level but who should remain on the air while a replacement is sought.

would be required. Stations would not be required to maintain records of the race or gender of any applicant for any vacancy.

32. It should be noted that this proposed EEO Regulation does not insulate any so-called “bad actors.” If a station opts to use this certification process, it would do so knowing: (a) that it was making a material representation to a federal agency; (b) that it could be subject to random audit or an audit based on a complaint; and (c) and, that, therefore it should maintain records of job vacancy Internet postings and the resumes and applications considered. However, a station would not be required to develop information on, or keep records of, the race, ethnicity or gender of persons posting their resumes on the web pages and site or of persons responding to individual job vacancies. To require a station to generate and track that type of information is to create a strong disincentive against the use of the Internet as a job recruitment tool. The number of people posting their resumes and the number of persons responding to a job opening could be very substantial. If a station had to send e-mails, letters or faxes or make telephone calls to all of those people to determine their race and gender, the administrative burden would be overwhelming, even apart from the problems this requirement would raise under the Fifth Amendment. See ¶ 35 below.

33. The program proposed by the Associations in these Comments is the sort of nondiscriminatory outreach that the Court of Appeals held in the *Lutheran Church* case does not implicate the Fifth Amendment. *Lutheran Church*, 141 F.3d at 351; see *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469, 507 (1989) (courts must analyze whether government has looked first at race-neutral measures in judging whether the government can establish that racial classifications are narrowly tailored to advancing an identified compelling interest). Moreover,



the FCC's focus will be on the key goal -- making sure that stations not place their "sole reliance on word-of-mouth recruiting where an employer's workforce is predominantly white male" (*NPRM* ¶ 62), and ensuring that stations make broader nondiscriminatory outreach efforts to a wide range of potential applicants, including minorities and women, for job openings. The Commission will not be elevating "process" or paperwork requirements over that bottom line goal. By focusing on nondiscriminatory outreach, the Commission will also avoid the need to rely on the constitutionally noxious stereotypes condemned by Justice O'Connor in her dissent in *Metro Broadcasting*.

34. It is crucial to note that by relying on the use of Broadcast Careers Web Pages and the BEDA Broadcast Careers Web Site in its new EEO Regulations, the Commission will be effectively *encouraging* stations throughout the nation to use the ubiquitous and very effective Internet technology. An increasing number of stations will inevitably join the system once the Commission adopts the EEO Regulations proposed in these Comments; and these stations will then post their openings on the Internet where they will be widely available to those of all races and genders, and will consider the qualifications of persons of all races and genders whose resumes are on the world wide web. As more stations use the Internet job bank to do outreach, the Commission's goal of ensuring wide outreach to people of all races and genders will be increasingly met. The new EEO Regulations and the Broadcast Careers Web Pages and Site will work together in a kind of "positive feedback loop" to make the system more effective right from the start.

35. The Commission has no need to adopt, and should not require, the elaborate race-conscious "self-assessment" steps, involving burdensome paperwork requirements, which it

proposes in the *NPRM* in connection with an outreach program. *See, e.g., NPRM* at ¶ 65. Any requirement that stations keep records of the race and gender of each applicant or interviewee, keep further records of the number of people of each race and gender that are referred by each particular recruiting source, and then compare any of these numbers to some hypothesized labor force in order to test whether there has been a racial or gender "cross section" of applicants or interviewees, will work at cross-purposes to encouraging the wide use of the Internet (for the reasons explained in ¶ 32 above), and will also be subject to strict scrutiny under the Fifth Amendment. This is because when such comparisons to the labor force are used to do analyses of racial or gender "underrepresentation," whether by a station or by some third party contesting the efforts of the broadcaster, the FCC's new regulations will require "race-based decisionmaking" and will indisputably pressure stations to make race-based employment decisions. Thus, these requirements would not only create burdensome paperwork, they would also subject the Commission's rule to reversal under the Fifth Amendment. *Lutheran Church*, 154 F.3d at 491; *see also Wessmann v. Gittens*, 160 F.3d at 799 ("[u]nderrepresentation is merely racial balancing in disguise -- another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.")

#### **D. THE FILING OF ANNUAL EMPLOYMENT REPORTS SHOULD NOT BE REQUIRED**

36. The Associations do not believe that stations should be required to file annual employment reports (Form 395-B). Both federal and state agencies with more expertise in employment matters already collect voluminous statistical information on employment, including statistics relating to race and gender, and there is no need for the FCC to duplicate these efforts.

37. The Commission's proposal that stations be required to file annual reports, and maintain those reports in their public files, raises grave issues under the Fifth Amendment. This is because it is far too easy for either the Commission or a third-party filing a petition to deny to use these reports for the *improper* purpose of comparing the racial or ethnic composition of a particular station's workforce to the composition of some sort of hypothesized labor pool and then to use such comparisons to make claims about the supposed defects in its recruitment efforts toward minorities or its commitment to nondiscrimination. And such allegations which "indisputably pressure ... stations to make race-based hiring decisions, ... [and would therefore be] subjected to strict scrutiny." *Lutheran Church*, 154 F.3d at 491 (citation omitted); see ¶ 12 above.

**E. THE COMMISSION SHOULD CONTINUE TO ENFORCE  
A NON-DISCRIMINATION REQUIREMENT BUT SHOULD  
RELY ON THE EEOC, COURTS AND STATE EEO AGENCIES  
FOR RESOLUTION**

38. The Associations support the Commission's position that the Commission should prohibit its broadcast licensees from discriminating on the ground of race, color, national origin, religion or sex. As Commissioner Powell eloquently states in his Separate Statement to the *NPRM*: "If the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived." But the FCC should defer to the United States Equal Employment Opportunity Commission ("EEOC"), or to the courts or state EEO agencies, for the *resolution* of cases relating to discrimination complaints, whether the complaints involve discrimination against an individual or allegations of a "pattern and practice" of discrimination. This will permit the agencies with real expertise to determine whether allegations of discrimination are valid. If the

EEOC or a court makes a final determination that a broadcaster has in fact discriminated, the FCC can then determine the appropriate sanction to impose on the broadcaster's license.

39. The EEOC was established by Title VII of the Civil Rights Act of 1964. The EEOC enforces the principal federal statutes prohibiting employment discrimination, including Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act of 1967, as amended; the Equal Pay Act of 1963; Title I of the Americans with Disabilities Act of 1990; the Civil Rights Act of 1991; and Section 501 of the Rehabilitation Act of 1973, as amended. EEOC functions are performed not only at its headquarters in Washington, D.C., but also at fifty field offices around the United States. The EEOC's administrative enforcement program manages between 75,000 and 80,000 charges that are filed annually, and the EEOC also contracts with approximately ninety "Fair Employment" agencies to process more than 48,000 discrimination charges alleging claims under state and local laws prohibiting employment discrimination. (See Exhibit 4, a copy of EEOC Internet Home Page). Thus, the EEOC not only has primary responsibility for enforcing EEO violations but it also has enormous experience in this highly specialized area.

40. In contrast, the FCC has no particular expertise in the handling of discrimination cases and has litigated very few of such cases over the years. For these reasons, the Associations submit that allegations of employment discrimination should be handled in the same way that the FCC handles other types of business misconduct. For instance, in the areas of anticompetitive conduct and antitrust violations, the Commission limits its character inquiry to adjudicated violations. The Commission has specifically explained its rationale as follows:

While such activity may have a potential bearing on the applicant's character, we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws. As we have observed in the *Underbrush* proceedings, other government agencies -- most notably the Department of Justice and the Federal Trade Commission -- have been given primary responsibility in policing antitrust and anti-competitive activity. In addition, individuals or corporations can bring lawsuits alleging violation of antitrust or anticompetitive laws. In this regard, we are of the view that, for the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing such activity. We find that this approach strikes an appropriate balance between the need to consider the relevancy of such activity, our desire not to duplicate the adjudicative functions of the courts of [sic] other government agencies and our concern with the basic fairness of our proceedings to participating litigants.

Character Qualifications, 102 F.C.C.2d 1179, 1202-1203.

41. The Commission's rationale for deferring to authorities with jurisdiction to enforce laws dealing with anticompetitive conduct is equally applicable to the EEO context. The EEOC (as well as state authorities and the courts) have the primary responsibility, knowledge and personnel to resolve complaints of discrimination. The FCC, on the other hand, has virtually no expertise in this area. Thus, for purposes of character qualifications, the FCC should consider only adjudications from the EEOC (or a court of competent jurisdiction, or other governmental unit charged with the responsibility of policing discrimination.)

42. In ensuring that licensees do not discriminate, the FCC should recognize that the larger the licensee company or institution, the more employees and the greater the opportunity for personality clashes and misunderstandings that may lead to complaints of discrimination. Even a finding by the EEOC that a particular supervisor has discriminated against an employee, while

serious, does not necessarily mean that the FCC should conduct a hearing as to the licensee's character qualifications. Rather, the FCC should take into account all the facts and circumstances in determining whether there should be a hearing and in imposing any sanctions against a licensee. As with anticompetitive conduct, this approach strikes the appropriate balance between the relevancy of such activity, the avoidance of duplicative adjudications and basic fairness to litigants.

43. In the *NPRM* (at ¶ 59), the Commission proposes to defer "individual complaints of employment discrimination against broadcast licensees" to the EEOC, but to retain discretion to consider such complaints itself. The Associations submit that there is no ground for the FCC to itself litigate any complaints. The FCC has not explained why a complaint should be retained by the FCC rather than sent to the expert agency EEOC, nor has it described the factors the Commission would use to guide its "discretion" to retain a complaint. The FCC also proposes to itself "examine any allegations of patterns of discriminatory behavior," rather than to send complaints alleging such patterns of discrimination to the EEOC. But there is no good reason for making a distinction between "individual" complaints and complaints relating to a "pattern." Allegations that a broadcaster has engaged in a pattern or practice of discrimination should also be deferred to the EEOC. The 1985 *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed.Reg. 21798 (1986), makes no distinction between individual and pattern and practice complaints, providing instead that the EEOC will adjudicate *all* complaints within its jurisdiction. More importantly, the EEOC has as much, if not more, experience in adjudicating "pattern and

practice" complaints as in adjudicating charges of discrimination against an individual.<sup>8</sup> By contrast, the FCC has little if any experience in adjudicating complaints that there is a "pattern or practice" of discrimination.

#### **F. THE COMMISSION SHOULD NOT PERMIT RELITIGATION OF DISCRIMINATION DECISIONS BY COURTS**

44. The Associations believe that the Commission should make it clear and explicit in any new EEO Regulations that it will not relitigate or second-guess the findings of a competent court concerning whether a broadcaster has engaged in discrimination. There is a constitutional requirement that the Commission must afford the decisions of Article III courts full faith and credit. When a federal court issues a decision holding that no discrimination has occurred, the Commission may not second-guess that court. As the Second Circuit stated in Town of Deerfield, New York, 992 F.2d 420, 430 (2d Cir. 1993), any attempt by the Commission "to arrogate to itself the power to (a) review or (b) ignore the judgments of [Article III] courts...[is] impermissible as a matter of law." The Associations believe that it is unconscionable to hold a broadcast license hostage when the licensee has successfully won a court case on the same allegations. Any new EEO Regulations should make it clear that the FCC will not do so in the future.

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<sup>8</sup>See, e.g., *Local 28 of the Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421 (1986) (affirming finding of a pattern or practice discrimination by the EEOC and upholding the imposition of fines and preferential relief benefitting black and Hispanic individuals who were not actually victims); *EEOC v. O & O Spring and Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994) (upholding EEOC finding of pattern and practice racial and age discrimination and affirming the payment of back pay to victims of discrimination as a remedy), *cert. denied*, 115 S. Ct. 1270 (1995); *EEOC v. Mitsubishi Motor Manufacturing of America*, Case No. 96-1192 (C.D. Ill. 1998) (issuing consent decree settling an EEOC claim of pattern or practice of sexual harassment and securing \$34 million from Mitsubishi on behalf of a class of current and former female employees).

### **III. CONCLUSION**

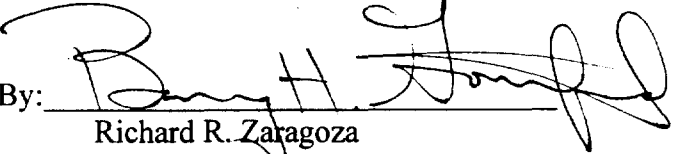
Based on the foregoing, if the Commission is persuaded to adopt a new set of EEO Regulations, the 46 named State Broadcasters Associations respectfully request the Commission to adopt regulations consistent with these Comments.

Respectfully submitted,

Alabama Broadcasters Association  
Alaska Broadcasters Association  
Arizona Broadcasters Association  
Arkansas Broadcasters Association  
California Broadcasters Association  
Colorado Broadcasters Association  
Connecticut Broadcasters Association  
Florida Association of Broadcasters  
Georgia Association of Broadcasters  
Hawaii Association of Broadcasters  
Illinois Broadcasters Association  
Indiana Broadcasters Association  
Iowa Broadcasters Association  
Kansas Association of Broadcasters  
Kentucky Broadcasters Association  
Louisiana Association of Broadcasters  
Maine Association of Broadcasters  
Maryland/District of Columbia/Delaware  
Broadcasters Association  
Massachusetts Broadcasters Association  
Michigan Association of Broadcasters  
Minnesota Broadcasters Association  
Mississippi Association of Broadcasters  
Missouri Broadcasters Association  
Montana Broadcasters Association  
Nebraska Broadcasters Association  
Nevada Broadcasters Association  
New Hampshire Association of Broadcasters  
New Mexico Broadcasters Association  
The New York State Broadcasters Association, Inc.  
North Dakota Broadcasters Association  
Ohio Association of Broadcasters  
Oklahoma Association of Broadcasters  
Oregon Association of Broadcasters



Pennsylvania Association of Broadcasters  
Radio Broadcasters Association of Puerto Rico  
Rhode Island Broadcasters Association  
South Carolina Broadcasters Association  
South Dakota Broadcasters Association  
Tennessee Association of Broadcasters  
Texas Association of Broadcasters  
Utah Broadcasters Association  
Vermont Association of Broadcasters  
Washington State Association of Broadcasters  
West Virginia Broadcasters Association  
Wisconsin Broadcasters Association  
Wyoming Association of Broadcasters

By:   
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Dated: March 1, 1999

## CERTIFICATE OF SERVICE

I, Marilyn Murphy, hereby certify that copies of the foregoing **"JOINT COMMENTS OF 46 NAMED STATE BROADCASTERS ASSOCIATIONS"** were served via hand-delivery on this 1st day of March, 1999, to the following:

William E. Kennard, Chairman  
Federal Communications Commission  
445 12th Street, SW  
Room 8-B210  
Washington, DC 20554

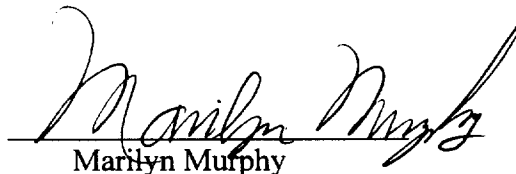
Office of Commissioner Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW  
Room 8-A302  
Washington, DC 20554

Office of Commissioner Susan Ness  
Federal Communications Commission  
445 12th Street, SW  
Room 8-B115  
Washington, DC 20554

Office of Commissioner Michael Powell  
Federal Communications Commission  
445 12th Street, SW  
Room 8-A204  
Washington, DC 20554

Office of Commissioner Gloria Tristani  
Federal Communications Commission  
445 12th Street, SW  
Room 8-C302  
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Roy J. Stewart, Chief  
Mass Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Room 2-C347  
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Marilyn Murphy